STATE OF MICHIGAN

COURT OF APPEALS

SHELLY NOWAK and BRAD NOWAK,

Plaintiffs-Appellees,

v

ELAINE K. GANTZ, D.D.S., ELAINE K. GANTZ, D.D.S. & ASSOCIATES, and ELAINE K. GANTZ, D.D.S., P.C.,

Defendants-Appellants.

UNPUBLISHED
April 18, 2006

No. 258688
Oakland Circuit Court
LC No. 2002-038692-NH

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiffs brought this dental malpractice action after the tip of an anesthetic needle broke off in plaintiff Shelly Nowak's gum and could not be removed.[1] Defendants Elaine Gantz, D.D.S., and the business entities through which she practices, appeal as of right a judgment in favor of plaintiffs, following a jury trial. We affirm in part, reverse in part, and remand for further proceedings.

Defendants first argue that the trial court should have granted judgment notwithstanding the verdict (JNOV) because plaintiffs' expert witness based his testimony on assumptions unsupported by the evidence. We disagree.

Judgment notwithstanding the verdict should be granted when the evidence, viewed in the light most favorable to plaintiffs as the nonmoving party, fails to establish a claim as a matter of law. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). "In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). The standard of care must be established by expert testimony. *Id.* An expert's testimony may not be based on assumptions contrary to established facts or inconsistent with a

[1] We refer to Shelly Nowak as "plaintiff" in the singular because Brad Nowak's claims are entirely derivative.

witness' personal observations. *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

Here, there was sufficient evidence to support the jury's verdict. Neither plaintiff nor Dr. Gantz, the only people present at the time of the incident, knew when or why the needle broke. The experts on both sides agreed that a needle is weakest at its hub, that it should never be inserted to its hub, and that the injection was misdirected for some reason. Although Dr. Gantz denied inserting the needle to its hub, she testified that she inserted it approximately four millimeters, which plaintiffs' expert testified was too far. There was also evidence that Dr. Gantz lost sight of the needle, that she left plaintiff alone to get an instrument, and that she may have embedded the needle further when she tried to locate it. Viewed in a light most favorable to plaintiffs, the evidence was sufficient to establish plaintiffs' claim that Shelly Nowak's injury was caused by Dr. Gantz's improper "injecting and/or instrumenting." The trial court did not clearly err in denying defendants' motion for JNOV.

Defendants also argue that the jury should not have been instructed on res ipsa loquitur, because the instruction was not supported by the evidence. We disagree.

We review claims of instructional error de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). For the doctrine of res ipsa loquitur to apply,

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (internal quotations and citation omitted).]

The jury was instructed that defendants were "not liable merely because of an adverse result. However, a doctor is liable if the doctor's negligent and the negligence is a proximate cause of an adverse result." The jury was also instructed, in accordance with SJI2d 30.05, as follows:

> If you find the defendant had control over the body of the plaintiff and/or the instrumentality which caused the plaintiff's injury, and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, you may infer the defendant was negligent. However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of the plaintiff's injury.

Defendants argue that this instruction was inappropriate because plaintiffs advanced a specific theory of negligence and presented expert testimony in support of that theory. However, no one knew exactly how the incident occurred, so the issue of negligence depended on

circumstantial evidence. Res ipsa loquitur was designed to address such situations. "Whether phrased as res ipsa loquitur or 'circumstantial evidence of negligence,' it is clear that such concepts have long been accepted in this jurisdiction." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). This case is distinguishable from *Locke v Pachtman*, 446 Mich 216; 521 NW2d 786 (1994), in which no evidence was presented on the appropriate standard of care. Here, there was expert testimony on the standard of care, including testimony that it was a violation of the standard of care to insert a needle forcefully up to the hub, to insert a needle in the wrong spot, to lose sight of the needle, to leave the patient alone after a needle breaks, not to know the dimensions of instruments, to lack a proper understanding of anatomy, and to be unfamiliar with proper injection technique including maintaining control of a patient's tongue.

Defendants also argue that res ipsa loquitur is inapplicable because there was testimony that plaintiff's tongue may have moved and misdirected the needle, so Dr. Gantz was not in exclusive control of plaintiff's body at the time of the incident. We disagree. There is no claim that there was any "voluntary action or contribution on the part of the plaintiff." *Woodard*, *supra* at 7. Dr. Gantz admitted that plaintiff "didn't do anything." Moreover, the needle and the periodontal elevator were entirely within Dr. Gantz's control. Because plaintiff's mouth was numb and out of her own range of vision, evidence of what really happened was more readily accessible to defendants than to plaintiffs.

Defendants next argue that the trial court erred in denying their motion for remittitur because the evidence showed that plaintiff did not comply with the recommended bite-splint therapy and because there was no evidence on the standard of care. We disagree. The trial court's denial of a motion for remittitur is reviewed for an abuse of discretion. *Diamond v Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005). "This Court considers the evidence in the light most favorable to the plaintiff when reviewing the trial court's exercise of discretion regarding remittitur." *Wiley*, *supra* at 498. As noted previously, there was ample evidence on the standard of care. There was also evidence that plaintiff wore her bite-splint every night and that she complied with her bite-splint therapy to the satisfaction of her treating dentist. Viewing the evidence in a light most favorable to plaintiffs, the trial court did not abuse its discretion in denying defendants' motion for remittitur.

Defendants argue that the trial court should have reduced the award of future damages to present cash value, as generally required by MCL 600.6306. Our analysis is made more difficult by the trial court's quite apparent exasperation and refusal to permit defendants to make a clear record; however, we conclude that defendants waived application of this statutory provision. The verdict form submitted to the jury did not specify the "periods over which [the damages] will accrue, on an *annual* basis," as required by MCL 600.6305(1)(b). The jury's lump-sum award of future damages, without specifying the years in which those damages would accrue, does not enable a court to reduce the damages to "gross present value" in accordance with MCL 600.6306(2), which defines "gross present value" to mean "the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact." Because defendants agreed to a verdict form that did not comply with MCL 600.6305 and MCL 600.6306, we conclude that defendants waived application of the statutory provision requiring that future damages be reduced to present value. *Weiss v Hodge* (*After Remand*), 223 Mich App 620, 625 n 1, 635-636; 567 NW2d 468 (1997).

Defendants also argue that the trial court erroneously awarded plaintiffs prejudgment interest on future damages. Plaintiffs agree that prejudgment interest was improperly awarded for the future damages portion of the judgment, because such interest is expressly prohibited by MCL 600.6013(1). Accordingly, we remand this case for recalculation of the award of prejudgment interest, without prejudgment interest on any future damages.

Finally, defendants argue that the trial court erred by failing to hold a hearing to consider their various challenges to plaintiffs' requested case evaluation sanctions. We agree. Defendants raised below, as they do on appeal, numerous challenges to plaintiffs' requested costs and attorney fees. The trial court acknowledged that defendants were entitled to a hearing to resolve disputed matters, but failed to hold one. The trial court therefore failed to exercise its discretion to determine which fees and costs were reasonable and permitted by statute. *Elia v Hazen*, 242 Mich App 374, 377; 619 NW2d 1 (2000). Accordingly, this matter must be remanded for a hearing on the reasonableness of plaintiffs' requested costs and fees and whether they are permitted by statute. It appears on the surface that there are genuine questions whether some of plaintiffs' requested costs and fees are permissible, e.g., costs for certain trial exhibits, "food and tips," and witness fees. "The power to tax certain expenses is statutory, and the prevailing party cannot recover such expenses absent statutory authority." *Elia*, *supra* at 379.

Affirmed in part, reversed in part, and remanded for recalculation of the prejudgment interest award and a hearing on plaintiffs' requested costs and fees. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis